Supreme Court, U.S.
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No. 98-1699

In the Supreme Court of the United States

OCTOBER TERM, 1999

DAVID P. HOULT,
PETITIONER,

v.

JENNIFER HOULT,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent Jennifer Hoult (the "Respondent"), pursuant to Rule 15 of the Rules of the Supreme Court of the United States, hereby submits this brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed by David P. Hoult (the "Petitioner"). For the reasons set forth below, the Petition should be denied.

STATEMENT OF ISSUE

Whether certiorari should be denied where: (1) a decision of the United States Court of Appeals for the First Circuit upheld a decision of the United States District Court for the District of Massachusetts dismissing Petitioner's complaint for libel against Respondent because the central issue presented by the libel complaint — whether Petitioner repeatedly raped Respondent when she was a child — already had been litigated and determined in an earlier action between the parties; and (2) the Petitioner does not present any basis or compelling reason for the grant of certiorari, but rather seeks to collaterally attack a prior final decision which the First Circuit rendered four years ago?

STATEMENT OF THE CASE

In May 1996, Petitioner commenced an action (the "Libel Action") in the United States District Court for the District of Massachusetts (the "District Court") against the Respondent alleging, among other things, that Respondent had libeled him by writing in three letters (the "Letters") that Petitioner had repeatedly raped Respondent when she was a child.

Respondent moved to dismiss the Libel Action pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the issue of whether Petitioner had repeatedly raped her when she was a child had already been litigated and determined in her favor in a prior action between the parties (the "Abuse Action"), in which she obtained a $500,000 jury verdict on July 1, 1993.[1]

Respondent had commenced the Abuse Action in 1988, seeking damages from the Petitioner, her father, for the repeated rapes Petitioner had inflicted on Respondent during

[1] *Hoult* v. *Hoult*, United States District Court for the District of Massachusetts, Civil Action No. 88-1738 (verdict for Respondent July 1, 1993); motion to vacate denied August 8, 1994; denial of motion to vacate upheld, *Hoult* v. *Hoult*, 57 F. 3d 1 (1995).

the course of her childhood. At the time she commenced the Abuse Action, Respondent was 27 years old. The rapes Petitioner had inflicted on her had occurred years earlier. However, Respondent argued that because she had repressed the memory of the rapes, the statute of limitations was not a bar to her claims.

The Abuse Action was tried in the District Court in June and July, 1993. To counter Petitioner's defense that the statute of limitations barred Respondent's claims, Respondent presented expert testimony regarding the psychological phenomenon of repression in victims of childhood sexual abuse. After an 8-day trial, the jury first made a specific finding that the statute of limitations did not defeat Respondent's claims, and then rendered a general verdict and judgment of $500,000 in favor of the Respondent and against the Petitioner.

One year after the jury verdict and judgment in the Abuse Action, in July 1994, Petitioner brought a motion in the District Court to vacate the judgment, arguing that, under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the District Court had improperly admitted the testimony of Dr. Renee Brant, Respondent's expert on repression in victims of childhood sexual abuse. The District Court denied Petitioner's Motion to Vacate the Judgment. Petitioner appealed to the First Circuit. The First Circuit upheld the District Court's decision.[2]

One year after the First Circuit upheld the judgment in the Abuse Action, petitioner commenced the Libel Action. As noted above, Respondent moved to dismiss the Libel Action, arguing that the judgment she won against Petitioner in the Abuse Action (as upheld by the First Circuit) collaterally estopped Petitioner from relitigating in the Libel Action the issue of whether he had raped Respondent.

The District Court heard Respondent's Motion to Dismiss on February 3, 1997. On February 14, 1997, the District

[2] *See Jennifer Hoult* v. *David P. Hoult*, 57 F.3d 1 (1995).

Court issued its Memorandum and Order (the First Order), granting the motion in part and denying it in part. The District Court ruled that, based on the judgment in the Abuse Action, Petitioner was collaterally estopped from claiming that Respondent had defamed him by writing that he "sexually abused" her. However, the District Court also ruled that Petitioner was not collaterally estopped from relitigating the issue of whether he had raped Respondent, as that precise issue was not necessarily determined by the general verdict rendered by the jury in the Abuse Action.

Respondent moved for reconsideration of that portion of the First Order which denied her Motion to Dismiss. In the Motion for Reconsideration, Respondent argued that the District Court had failed to recognize that the jury's specific finding that Jennifer's claims in the Abuse Action were not barred by the statute of limitations, in light of the testimony of her expert, Dr. Brant, necessarily included a finding that Petitioner had raped Respondent. Petitioner did not file an opposition to Respondent's Motion for Reconsideration.

On June 30, 1997, the District Court issued its Order on Respondent's Motion for Reconsideration (the "Order on Reconsideration"), allowing Respondent's motion, and dismissing the Libel Action in its entirety.

Petitioner appealed from the Order on Reconsideration on July 29, 1997. On the date Respondent's brief and appendix were due to be filed in the United States Court of Appeals for the First Circuit (the "First Circuit"), Petitioner filed a pleading styled "Suggestion of Bankruptcy", informing the First Circuit that he had filed a petition for relief under Chapter 7 of Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division (the "Bankruptcy Court"), and requesting that the First Circuit stay his appeal. The First Circuit denied Petitioner's request to stay his appeal.

After hearing oral argument, the First Circuit affirmed the District's Court's dismissal of the Libel Action by decision dated October 9, 1998. Petitioner moved for rehearing. The

First Circuit denied rehearing on November 9, 1998. After obtaining an extension of time within which to file the Petition, Petitioner filed the Petition on March 10, 1999. The Petition was docketed on April 22, 1999.

SUMMARY OF REASONS THE PETITION SHOULD BE DENIED

1. The Petition should be denied because the Petitioner seeks, in the guise of a petition for review of the First Circuit's ruling in the Libel Action, *Hoult* v. *Hoult*, 157 F 3d. 29 (1998) ("Hoult No. 2"), to obtain review of issues decided in the underlying Abuse Action and the First Circuit's affirmance of the judgment in the Abuse Action in *Hoult* v. *Hoult*, 57 F. 3d 1 (1995) ("Hoult No. 1"). Hoult No. 1 was decided four years ago in May, 1995. Accordingly, the time for seeking a writ of certiorari to review issues addressed and resolved in Hoult No. 1 is long past.[3]

2. The Petition should be denied because the First Circuit's well reasoned decision in Hoult No. 2 does not conflict with the decision of any other United States court of appeals; nor has the First Circuit in Hoult No. 2 decided an important federal question in a way that conflicts with a decision by a state court of last resort; nor has the First Circuit departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for exercise of this Court's supervisory powers. See Rule 10 of the Rules of the Supreme Court. Rather the First Circuit in Hoult No. 2 has engaged in a straightforward application of axiomatic legal principles. The Petitioner does not contend otherwise. In fact, the Petitioner does not even attempt to argue that the First Circuit's decision in Hoult No. 2 misapplied the doctrine of collateral estoppel. Instead, as noted

[3] In fact, Petitioner did seek to file a writ of certiorari in connection with Hoult No. 1. However, because the petition was filed after the deadline set forth in Rule 13 of the Rules of the United States Supreme Court, the clerk rejected it.

above, the Petition focuses on issues that were presented and decided in Hoult No. 1. The Petitioner cannot collaterally attack Hoult No. 1 through Hoult No. 2. Accordingly, as Petitioner has presented no compelling reason for this Court to grant certiorari to review Hoult No. 2, and as the time to seek certiorari for Hoult No. 1 has long past, the Petition should be denied.

STATEMENT OF FACTS

In the Libel Action, Petitioner claimed that Respondent libeled him by writing in the Letters that she was repeatedly raped by Petitioner during her childhood. As noted above, Respondent moved that the Libel Action be dismissed because the issue of whether Petitioner raped her already had been actually litigated and determined in her favor in the Abuse Action.

A. The Abuse Action

Respondent commenced the Abuse Action in July 1988 seeking to recover damages from Petitioner, her father, for the sexual abuse Petitioner inflicted on her during her childhood. The complaint in the Abuse Action specified the sexual abuse as

> . . . numerous acts of rape, of forcing [Respondent] to commit fellatio upon [Petitioner], of forcing her to submit to fondling and of exposing himself to her.

Respondent also alleged that these acts of sexual abuse were

> . . . invariably accompanied by force and by threats of even greater violence. At times [Petitioner] threatened to cut [Respondent] open or to rape her with a stick . . ., threatening to kill her or to do her great bodily harm.

Respondent claimed she initially repressed all memory of these abusive acts until, as an adult, she began to regain some memory of the horrors to which Petitioner had subjected her.

In the Abuse Action, Respondent initially sought recovery of the damages resulting from the sexual abuse she suffered in five counts: Assault and Battery[4]; Reckless or Intentional Infliction of Emotional Distress; Negligence; Negligent Infliction of Emotional Distress; and Breach of Fiduciary Duty. Respondent later withdrew the counts for Negligence and Negligent Infliction of Emotional distress, and, at trial, sought recovery on the three remaining counts.

While Respondent sought recovery in three counts, there was a single factual predicate for recovery: Respondent's allegations that while she was a child, Petitioner had repeatedly raped her.

The Abuse Action was tried to a jury over eight days in June and July 1993. From the outset, the focus of the Abuse Action was on Respondent's claim that Petitioner had repeatedly raped her during her childhood. For example, in the first sentence of her opening statement, Respondent's counsel framed for the jury the nature of the case and the heart of Respondent's claims as follows:

> Jennifer Hoult will live every day of her life with her memories of the *rape, torture and sexual abuse* that she suffered at the hands of her father, David Hoult, the defendant in this case.

(emphasis supplied).

In his opening statement, after brief introductory and general comments, Petitioner's counsel also told the jury that the case was about Respondent's allegations that Petitioner had repeatedly raped her during her childhood. In fact, in the 7 1/2 pages of trial transcript that comprise his opening

[4] Under Massachusetts law, there is no civil cause of action for rape. Such an action must be maintained under a theory of assault and battery. *See e.g., Glover* v. *Callahan*, 299 Mass. 55 (1937).

statement, Petitioner's counsel used the word "rape", or one of its variants, no less than 17 times.

At trial, Respondent testified about and described recovering the memory of seven specific incidents of sexual abuse. Respondent testified about her earliest memory of abuse, an occasion which occurred when she was about 4 years old, when Petitioner fondled and touched her on her breasts and between her legs. Respondent also described an incomplete memory of the beginning of a sexual attack. Her memory of that attack ended abruptly at a point where Petitioner had lifted her nightgown, placed his hand between her legs, and began to move his mouth down her body toward her genital area. In another incident she described, Petitioner forced her to commit fellatio upon him. In another attack, Petitioner tied Respondent's hands behind her and raped her while she lay face down on a couch. Respondent also described an incident when Petitioner raped her in the basement of the Hoult family home when she was in high school. Respondent testified that on another occasion when she was in high school Petitioner had raped her at her grandparents' home. Finally, Respondent testified about an occasion when Petitioner had raped her in her parent's bedroom at the family home in Wayland.

Petitioner denied Respondent's allegations, although, under cross examination, he did admit that he had grabbed the breasts of a teenage neighbor who had been hired to baby-sit his children—an act that Petitioner attempted to pass off as "goosing" a babysitter.[5]

Because Petitioner asserted the statute of limitations as a defense to Respondent's claims, the jury in the Abuse Action also heard testimony from an expert witness, Renee Brant, M.D., a Harvard educated psychiatrist, founder of the Child Abuse treatment team at Boston's Children's Hospital and specialist in the treatment of individuals who have been sexu-

[5] This incident contradicts Petitioner's claim that at trial of the Abuse Action there was no corrobration to Respondent's claims that her father was a child abuser. *See* Petition at 4.

ally abused as children. Among other things, Dr. Brant testified about how victims of childhood sexual abuse may repress and subsequently recover the memory of that abuse. Dr. Brant emphasized that repression of the memory of sexual abuse occurs in the context of *repeated* instances of sexual abuse over time. Dr. Brant also testified that in situations of repeated abuse, the severity of the abuse progresses over time, beginning with forms of touching and fondling, advancing to genital penetration and even to elements of sadism.

In their closing arguments in the Abuse Action, counsel for Petitioner and Respondent again framed for the jury that the principal issue to be determined was whether Petitioner had raped Respondent. Petitioner's counsel stated as follows:

> Good morning, ladies and gentlemen of the jury, as Judge Mazzone just pointed out to you, this part of the trial is the opportunity for each side to bring to your attention those matters that each of us believes to be important for your consideration and to highlight those portions of the case which we believe to be significant to our respective sides.
>
> As you know, having sat here for—or downstairs for several days, this case involves allegations brought by Jennifer Hoult against her father, my client, David Parks Hoult.
>
> Specifically, Jennifer alleges that her father sexually abused her. More specifically, Jennifer claims that her father raped her . . .

In closing arguments, Respondent's counsel summarized for the jury the conduct of the Petitioner which established Respondent's claim to damages. First, responding to Petitioner's counsel's suggestion that Respondent was seeking to characterize inappropriate hugs and kisses as sexual abuse, Respondent's counsel stated ". . . this [case] is not about hugging and kissing. She is claiming he assaulted her. He raped her. It's not inappropriate hugging and kissing."

In discussing damages, Respondent's counsel made clear that a necessary predicate for recovery was the repeated rapes Petitioner inflicted upon Respondent.

> Now, let me talk briefly about the harm that Jennifer has sustained as a result of these repeated sexual assaults by her father. As you heard Jennifer describe, her father forced her to have oral sex with him, performed oral sex on her, inserted his penis into her vagina, inserted his finger into her vagina. While he was doing these things, you heard the things he would say to her. He would call her a whore, a cunt. He would tell her he'd kill her if she ever told anyone.

In its jury instructions, the District Court reviewed the basis of Respondent's claims and framed for the jury the issue for determination as follows:

> [W]hat is this case about?
>
> The plaintiff, Jennifer Hoult, brought this lawsuit against defendant, David Parks Hoult, alleging that from the time she was approximately four years old and continuously thereafter until the age of 16 and perhaps on an isolated basis up to the age of 19, the defendant subjected her to numerous acts of sexual abuse. *As a result of the alleged acts of sexual abuse* the plaintiff has asserted the following claims under which she contends she is entitled to recover:
>
> (1) assault and battery;
> (2) infliction of emotional distress;
> (3) breach of fiduciary duty.

(emphasis supplied).

In instructing the jury on the count for Assault and Battery, the District Court focused the jury on the central issue as follows:

> Rape is a form of battery.
>
> Rape is defined as sexual intercourse and/or unnatural sexual intercourse with a person by force and against her will or by threat of bodily injury.
>
> Sexual intercourse is defined as the penetration of the female sex organ by the male sex organ, with or without emission.
>
> Unnatural sexual intercourse is defined as oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another person. A finger is comprehended within the meaning of the words "a part of a person's body" as used in the construction of words "unnatural sexual intercourse."
>
> Rape of a child is a commission of any of the above acts with a child under 16 by force or against her will or by threat of bodily injury. Further, a child under the age of 16 cannot consent to sexual contact with an adult.

With regard to Respondent's count for Intentional Infliction of Emotional Distress, the District Court instructed the jury that a finding for Respondent required Respondent's establishing by a preponderance of the evidence that:

(1) the *conduct* of the defendant was extreme and outrageous;
(2) the *conduct* was intentional or reckless;
(3) the plaintiff suffered emotional distress as a result of the plaintiff's *conduct;* and
(4) the emotional distress was severe.

(emphasis supplied).

Finally, with regard to Respondent's claim for breach of fiduciary duty, the District Court instructed the jury that Respondent had to show:

(1) that the defendant is her father;
(2) that the defendant initiated sexual contact between them; and
(3) that the defendant's initiation of sexual contact between them constitutes a breach of the defendant's fiduciary duties to care for and protect the well-being of his daughter.

The jury was given a specific question to answer on the issue of whether Respondent's claims were time-barred. The jury found that the statute of limitations did not bar Respondent's claims, thereby crediting the testimony that Respondent had repressed the memory of the sexual abuse she had suffered. The jury returned a general verdict for Respondent in the amount of $500,000 to "compensate [her] for any and all injuries suffered as a result of the *conduct* of the defendant." (emphasis supplied).

Judgment entered on July 14, 1993. Petitioner moved for a new trial pursuant to Fed. R. Civ. P. 59. He later appealed from the judgment. Petitioner's motion for a new trial was denied. Petitioner then appealed that decision. Ultimately each of Petitioner's appeals were dismissed for lack of prosecution.

On July 14, 1994, one year to the day after the entry of judgment in the Abuse Action, Petitioner filed a Motion to Vacate the Judgment (the "Motion to Vacate") pursuant to Fed. R. Civ. P. 60.

Notwithstanding the fact that Petitioner had made no objection to Dr. Brant's qualifications or to her testimony at trial, in his Motion to Vacate Petitioner argued, among other things, that the trial court erred in allowing Dr. Brant to testify. Petitioner argued that under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the trial court should have precluded *sua sponte* Dr. Brant's testimony on repressed memory which Petitioner characterized as "junk

science."[6] After briefing and oral argument, the District Court denied Petitioner's Motion to Vacate.

Petitioner appealed the denial of his Motion to Vacate to the First Circuit. In Hoult No. 1, the First Circuit (Tourella, C.J.), affirmed the District Court's denial of the Motion to Vacate. The Petitioner then attempted to file a petition for certiorari from the First Circuit's decision in Hoult No. 1. However, the petition for certiorari was rejected because Petitioner filed it too late.

B. *The Libel Action*

In the March/April 1995 edition of the *Skeptical Inquirer*, Dr. Elizabeth F. Loftus, a psychologist who has provided expert testimony for defendants in so-called repressed memory cases but who was not involved in the Abuse Action, wrote about the Abuse Action and other repressed memory cases in an article (the "Article") entitled "Remembering Dangerously."

In the Article, Dr. Loftus mischaracterized Respondent's testimony in the Abuse Action, implied that Respondent's memories of the sexual abuse were false, and, by impugning the veracity of Respondent's testimony, held Respondent up to ridicule and derision. In addition, Dr. Loftus failed to disclose to the readers of that Article that she was a member and director of the False Memory Syndrome Foundation ("FMSF"), an advocacy group founded by people who claim to have been falsely accused of sexually abusing children.

After requesting and reviewing materials from the American Psychological Association ("APA"), a professional association to which Dr. Loftus belonged at the time she wrote the Article, Respondent concluded that Dr. Loftus's mischaracterization of the facts of the Abuse Action were a violation of the APA's ethical canons. To defend her reputation

[6] The decision in *Daubert* was issued on June 28, 1993. Dr. Brant began her testimony in the Abuse Action on June 24, 1993. Dr. Brant completed her testimony on June 28—the day *Daubert* was issued.

and challenge what she believed were the inaccuracies, innuendo and invective of Dr. Loftus's Article, Respondent, pursuant to APA procedures, filed a formal ethics complaint against Dr. Loftus with the APA.

Dr. Loftus resigned from the APA shortly after Respondent submitted that ethics complaint, and the APA subsequently declined to pursue the matter based upon Dr. Loftus's resignation.

Thereafter, Respondent learned that Dr. Loftus had been invited to serve as program director for a conference sponsored by the Southwestern Psychological Association ("SWPA") where the issue of so-called "false memories" was to be discussed. Believing that Dr. Loftus would again mischaracterize the proceedings, nature and testimony of the Abuse Action and thereby hold Respondent up to ridicule and derision, Respondent wrote SWPA's president and board in order to protect her reputation and to apprise them of the APA ethics complaint she had filed against Dr. Loftus and of the bases therefor.

Respondent later wrote the British Psychological Society ("BPS"), another professional association to which Dr. Loftus belongs, to formally complain about Dr. Loftus's conduct. Respondent requested the BPS to institute an ethics investigation of Dr. Loftus pursuant to its procedures. Respondent attached to this request a copy of the ethics complaint she had earlier filed with the APA.

Petitioner became aware of the Letters and, in May 1996, filed the Libel Action, alleging that Respondent had libeled him in the Letters by writing that he had raped her.

Respondent moved to dismiss the Libel Action pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the issue of whether Petitioner had repeatedly raped her when she was a child had already been litigated and determined in the Abuse Action as affirmed by Hoult No. 1, and, accordingly, that Petitioner was collaterally estopped from relitigating that issue.

The District Court heard Respondent's Motion to Dismiss on February 3, 1997. On February 14, 1997, the District Court issued its Memorandum and Order (the "First Order"), granting the motion in part and denying it in part. The District Court ruled that, based on the judgment in the Abuse Action, Petitioner was collaterally estopped from claiming that Respondent had defamed him by writing that he "sexually abused" her. However, the District Court also ruled that Petitioner was not collaterally estopped from relitigating the issue of whether he had raped Jennifer as that precise issue was not necessarily determined by the general verdict rendered by the jury in the Abuse Action.

Respondent moved for reconsideration of that portion of the First Order which denied her Motion to Dismiss. In the Motion for Reconsideration Respondent argued that the District Court had failed to recognize that the jury's specific finding that Respondent's claims in the Abuse Action were not barred by the statute of limitations, in light of the testimony of her expert, Dr. Brant, necessarily included a finding that Petitioner had raped Respondent. Petitioner did not file an opposition to Respondent's Motion for Reconsideration.

On June 30, 1997, the District Court issued its Order on Respondent's Motion for Reconsideration (the "Order on Reconsideration"), allowing Respondent's motion, and dismissing the Libel Action in its entirety.

Petitioner appealed from the Order on Reconsideration on July 29, 1997. On the date Respondent's brief and appendix were due to be filed in the First Circuit, Petitioner filed a pleading styled "Suggestion of Bankruptcy", informing the First Circuit that he had filed a petition for relief under Chapter 7, and requesting that the First Circuit stay his appeal.[7] The First Circuit denied Petitioner's request to stay

[7] In the Bankruptcy Court, Petitioner is seeking to discharge the judgment Respondent won against him in the Abuse Action. When Respondent moved for summary judgment of her claim that the Abuse Action judgment, which was based on Petitioner's repeated rapes of Respondent, was nondischargeable under Section 523 (a)(6) of the Bankruptcy Code which excepts from

his appeal. After hearing oral argument, the First Circuit affirmed the District's Court's dismissal of the Libel Action by decision dated October 9, 1998 (Hoult No. 2). Petitioner moved for rehearing. The First Circuit denied rehearing on November 9, 1998. After obtaining an extension of time within which to file the Petition, Petitioner filed the Petition on March 10, 1999. The Petition was docketed on April 22, 1999.

REASONS FOR DENYING THE PETITION

I. The Petition For The Decision In Hoult No. 2 Should Be Denied Because Petitioner Is Using It As A Guise To Seek Review Of Issues Decided In Hoult No. 1. The Time To Seek Certiorari For Hoult No. 1 Is Long Past.

In its decision in Hoult No. 2, the First Circuit, in upholding the District Court's dismissal of the Libel Action, concluded that:

> The present lawsuit seeks, in the guise of a defamation action, to retry the central issue in the prior assault case between the same litigants. That issue . . . was resolved by the jury at the first trial . . . its decision . . . is not now open to relitigation.

---

discharge judgments based on "wilfull and malicious acts", Petitioner's counsel argued that summary judgment could not enter because there was a material issue of fact as to whether Petitioner *intended* to harm Respondent *when he raped her*. In an effort to avoid summary judgment, Petitioner's cousel, with Petitioner seated next to her, stated that *Petitioner would testify that while he did rape Respondent*, he did not intend to harm her, and, therefore, under this Court's recent decisions in *Kawaauhu* v. *Geiger*, 523 U.S. 57 (1998), the judgment was dischargeable. On the basis of this proffer of testimony, the Bankruptcy Court denied summary judgment, ruling that a genuine issue of material fact existed as to Petitioner's intent when he committed the rapes. In subsequent proceedings after the Bankruptcy Court denied summary judgment, Petitioner's counsel advised the court that Petitioner would not admit to the rapes.

See Hoult No. 2, which is appended to the Petition at App. 6.

In the same way Petitioner sought to retry issues that had been determined in the Abuse Action in the "guise" of the Libel Action, Petitioner here attempts to have this Court review issues that were addressed and resolved in Hoult No. 1 in the "guise" of a petition for certiorari from Hoult No. 2.

One need go no further than the Petitioner's statement of "Questions Presented" and a review of the First Circuit's decision in Hoult No. 1 (which is reproduced in the Appendix to the Petition beginning at App. 8) to discover that Petitioner's sole and exclusive interest here is in challenging the First Circuit's decision in Hoult No. 1—not in seeking the Court's review of the First Circuit's decision in Hoult No. 2.

Each of the questions presented by Petitioner relate to whether the District Court judge in the Abuse Action properly admitted the expert testimony of Dr. Brant regarding repression and recovery of the memory of childhood sexual abuse. The questions presented by Petitioner in his Petition are the same questions that were at issue in and decided by the First Circuit in Hoult No. 1. *See* Hoult No. 1, Petition at App. 10, where the court stated that: "Defendant's primary contention [in Hoult No. 1] is that the trial judge erred in allowing plaintiff's expert witness, Dr. Brant, to testify with respect to the phenomenon of repressed memory in the context of childhood sexual abuse."

In Hoult No. 1, the First Circuit rejected Petitioner's argument that the admission of Dr. Brant's testimony was error which required that the judgment in the Abuse Action be vacated.[8] Hoult No. 1 was decided on May 22, 1995. Pursuant to Rule 13 of this Court's Rules, Petitioner had 90 days from that date to seek certiorari from Hoult No. 1. Petitioner's 90 days are long past. He cannot use the decision in Hoult No. 2

[8] Among other things, the First Circuit noted that at no time, either before or during trial of the Abuse Action, did Petitioner object to Dr. Brant's qualifications as an expert witness or to her testimony in general. *See* Hoult, No. 1, Petition at App. 11.

to circumvent the results of his failure to timely seek and obtain certiorari from Hoult No. 1. For this reason alone, the Petition should be denied.[9]

II. There Are No Grounds To Grant Certiorari For The First Circuit's Decision In Hoult No. 2

In Hoult No. 2, the First Circuit affirmed the District Court's sound application of principles of collateral estoppel in dismissing the Libel Action. There are no grounds to grant certiorari to review that decision. Moreover, because the Petitioner focuses solely on issues that were addressed and decided by the First Circuit in Hoult No. 1, the Petition provides absolutely no basis for granting certiorari. The Petition offers no argument that in Hoult No. 2 the First Circuit misapplied the well-established principles of collateral estoppel in a manner

[9] Because the Petitioner cannot at this late date properly seek certiorari for the alleged errors of the trial court in the Abuse Action and the First Circuit in Hoult No. 1, it is not necessary here to address all of Petitioner's arguments regarding the admissibility of expert testimony on repressed memories of childhood sexual abuse. That said, it must be noted that Petitioner's argument that such testimony is or should be inadmissible under *Daubert* is contradicted by numerous cases, including *Shahzade* v. *Gregory*, 923 F. Supp. 286 (1996) where the United States District Court for the District of Massachusetts (Harrington, J.), in ruling on a motion in limine to preclude expert testimony on repressed and recovered memories of childhood sexual abuse, expressly held under a *Daubert* analysis that: (i) the scientific validity and reliability of the phenomenon of repressed memories has been established: (ii) testimony on the phenomenon of the repressed memory of sexual abuse is admissible; and (iii) in ruling that repressed memory evidence is admissible, a court does not rule on the credibility of the individual plaintiff's memories. The court stated: "For the law to reject a diagnostic category generally accepted by those who practice the art of psychiatry would be folly. Rules of law are not petrified in the past but flow with the current of expanding knowledge." *Shahzade* at 290. Likewise, in *Phinney* v. *Morgan*, 39 Mass. App. Ct. 202 (1995) *rev. den.*, 421 Mass. 1104 (1995), the Massachusetts Appeals Court stated: "*We recognize that because of the nature of the injury and the relationship of the parties, a child may repress all memory of the abuse*, lack undestanding of the wrongfulness of the conduct, or be aware of any harm or its cause *until years after the abuse*. *Phinney* at 204-205 (emphasis added).

which conflicts with decisions from other circuits; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. See Rule 10 of the Rules of the United States Supreme Court.

The First Circuit's decision in Hoult No. 2 (like the District Court's decision reviewed therein) was firmly grounded in the well-established legal doctrine of collateral estoppel, the contours of which, as the court in Hoult No. 2 observed, were "largely undisputed" by the parties to Hoult No. 2. *See* Hoult No. 2, Petition at App. 3.

The doctrine of collateral estoppel articulates the fundamental principle of jurisprudence that material facts or issues of law which were directly in issue in a former action, and were there judicially determined by a valid final judgment, are conclusively settled as between the parties in a subsequent action whether on the same or a different claim. *Grella* v. *Salem Five Cents Savings Bank*, 42 F.3d 26, 30 (1st Cir. 1994); and *Kalman* v. *Berlyn Corp.*, 614 F. Supp. 1327, 1329 (D. Mass. 1985). *See also* Restatement 2d Judgments § 27 (1982).

This basic doctrine, alternatively labeled collateral estoppel or issue preclusion, protects a party from the burden of relitigating issues that have been tried in a prior action and decided against the party's adversary. *Comair Rotron, Inc.* v. *Nippon Densan Corp.*, 49 F.3d 1535, 1537 (Fed Cir. 1995); and *DeCosta* v. *Viacom Int'l., Inc.*, 981 F.2d 602, 605 (1st Cir. 1992), *cert. den.* 509 U.S. 923 (1993). Preclusion of the relitigation of issues previously adjudicated serves the interests of judicial economy and, by preventing the possibility of inconsistent decisions, the reliability of judgments. *Allen* v. *McCurry*, 449 U.S. 90, 94-96 (1980).

As the District Court and First Circuit found, the Respondent established each of the essential elements for collateral estoppel. The Petitioner does not contend otherwise. Accordingly, the First Circuit properly upheld the District Court's

ruling that the doctrine of collateral estoppel precluded Petitioner from relitigating the issue of whether he raped Respondent. More importantly, the First Circuit's ruling does not conflict with any decision or any other United States Court of Appeal; does not conflict with any decision of any state court of last resort; and does not depart from the usual course of judicial proceedings. Rather, the First Circuit in Hoult No. 2 engaged in a straightforward application of axiomatic legal principles. Accordingly, there is no reason (and, as noted above, Petitioner has provided no reason) for this Court to grant the Petition.

A. *The First Circuit Properly Upheld the District Court's Conclusion That The Central Issue Of The Libel Action—Whether Petitioner Raped the Respondent—Was Actually Litigated And Decided In The Abuse Action*

In the Libel Action, Petitioner alleged that Respondent libeled him in the Letters by writing that during her childhood Petitioner repeatedly raped her. As set forth above, the very statements Petitioner claimed were libelous were the basis of Respondent's complaint against Petitioner in the Abuse Action. The issue framed for adjudication by the complaint in the Libel Action was identical to the central issue that was presented in the Abuse Action. Moreover, the testimony of the witnesses, the arguments of counsel and the jury instructions in the Abuse Action also make clear that the central issue tried and determined in the Abuse Action was the same issue raised by the Libel Action.

B. *The First Circuit Correctly Upheld The District Court's Ruling That The Issue Of Whether Petitioner Raped The Respondent Was Actually Litigated In The Abuse Action*

As noted above, in the first sentence of her opening statement at trial in the Abuse Action, Respondent's counsel

focused the jury on the allegations which would form the basis of Respondent's recovery:

> Jennifer Hoult will live every day of her life with her memories of the rape, torture and sexual abuse that she suffered at the hands of her father, David Hoult, the defendant in this case.

Respondent then testified about the sexual abuse she suffered at Petitioner's hands, detailing numerous acts of rape.

At the close of evidence in the Abuse Action, counsel for Respondent and counsel for Petitioner each argued to the jury that the Abuse Action was about Respondent's claims that she had been sexually abused by being repeatedly raped by Petitioner.

Finally, in its jury instructions, the court in the Abuse Action framed the issue that had been litigated and which the jury was to determine as follows:

> [W]hat is this case about?
>
> The plaintiff, Jennifer Hoult, brought this lawsuit against the defendant, David Parks Hoult, alleging that from the time she was approximately four years old until the age of 16 and perhaps on an isolated basis up to the age of 19, the defendant subjected her to numerous acts of sexual abuse. As a result of the alleged abuse, the plaintiff has asserted the following claims under which she contends she is entitle to recover: (1) assault and battery; (2) infliction of emotional distress; and (3) breach of fiduciary duty.

In its instructions on the Assault and Battery count, the court gave a detailed instruction on rape, making even more clear that the issue upon which the jury should be focused was Respondent's claim that Petitioner had repeatedly raped her during the course of her childhood.

> Rape is a form of battery. Rape is defined as sexual intercourse and/or unnatural sexual intercourse with a person by force and against her will or by threat of bodily injury. Sexual intercourse is defined as the penetration of the female sex organ by the male sex organ, with or without emission. Unnatural sexual intercourse is defined as oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another person. A finger is comprehended within the meaning of the words part of a person's body as used in the construction of the words unnatural sexual intercourse. Rape of a child is a commission of any of the above acts with a child under 16 by force or against her will or by threat of bodily injury. Further a child under the age of 16 cannot consent to sexual contact with an adult.

The First Circuit (and the District Court) considered the foregoing record, and correctly concluded that "the rape charges were the centerpiece of [the Abuse Action]" and that any argument to the contrary "is a wholly unrealistic assessment of a trial in which the rapes were the central and pivotal issue, the fondlings were the preface to the rapes, and the violence was connected to the rapes (either as a part of the rapes or to encourage silence)". *See* Hoult No. 2, Petition at App. 4 and 6. The record reviewed by the District Court and First Circuit leaves no doubt that the central issue raised by the Libel Action—whether Petitioner repeatedly raped Respondent during her childhood—was actually litigated in the Abuse Action.

C. *The First Circuit Correctly Upheld The District Court's Ruling That The Issue Of Whether Petitioner Raped the Respondent Was Necessarily Determined In The Abuse Action*

The doctrine of collateral estoppel precludes relitigation of issues necessarily determined in a prior action even where

there is no specific finding or reference to those issues in the judgment. *Grella, supra*, 42 F.3d at 30-31 ("[a]n issue may be 'actually' decided even if it is not *explicitly* decided, for it may have constituted, logically or practically, a necessary component of the decision reached in the prior litigation." (emphasis in original) (*quoting Dennis* v. *Rhode Island Hosp. Trust*, 744 F. 2d 893, 899 (1st Cir. 1984)); accord *Campbell* v. *State of Maine, et al;* 632 F. Supp. 111, 119 (D. Me. 1985), *aff'd*, 787 F. 2d 776 (1st Cir. 1986) (citing *Dennis*); and *In Re Belmont Realty Corp.*, 11 F 3d 1092, 1097 (1st Cir. 1993).

Stated another way, an estoppel by judgment will operate where an issue attempted to be raised in a second case was central to the route that led the factfinder to the judgment reached. *Commercial Associates* v. *Tilcon Gammino, Inc.*, 998 F.2d 1092 (1st Cir. 1993).

As the First Circuit correctly observed (Hoult No. 2, Petition at App. 3), the fact that the jury in the Abuse Action rendered a "general verdict" without an explicit finding of rape does not mean that the issue was not decided or that it did not constitute, "logically or practically, a necessary component of the decision reached." *Dennis* v. *Rhode Island Hospital Trust National Bank, supra*, 744 F. 2d at 899. The First Circuit properly examined the whole record of the Abuse action to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the [Respondent] seeks to foreclose from consideration." *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970). In considering the whole record of the Abuse Action, the First Circuit (like the District Court) properly concluded that "the rape charges were the centerpiece of [Respondent's] case" and any argument to the contrary would be "a wholly unrealistic assessment of a trial in which the rapes were the central and pivotal issue." *See* Hoult No. 2, Petition at App. 4 and 6.

1. *The First Circuit Properly Ruled That The Jury's Finding On The Statute Of Limitations Question In The Abuse Action Necessarily Included A Finding That Petitioner Had Repeatedly Raped Respondent*

At trial in the Abuse Action, Respondent testified to repressing and then recovering the memory of a long history of sexual abuse inflicted on her by Petitioner. Respondent specifically detailed for the jury several incidents where Petitioner raped her (according to the definition of rape used by the trial court in its jury instructions).

To support her claim that she had repressed the memory of the sexual abuse she suffered from Petitioner, and to counter Petitioner's statute of limitations defense, Respondent presented an expert—Dr. Renee Brant. Dr. Brant testified that an explanation for Respondent's lapse of memory regarding the abuse she suffered was the psychological defense mechanism of repression.

Most significantly, Dr. Brant testified that repression is the "kind of psychological defense mechanism that especially comes into play in situations of *repeated* trauma over time." Dr. Brant also emphasized that if Respondent repressed memory of sexual abuse, the repression she experienced would be the result of *repeated* instances of sexual abuse—not just a single isolated incident or a few random incidents.

The jury obviously credited Dr. Brant's testimony in specifically finding that Respondent's repression defeated Petitioner's statute of limitations defense. Moreover, because the "repeated" incidents of sexual abuse over time described by Respondent were rapes, in finding that Respondent repressed the memory of the sexual abuse she suffered, the First Circuit and District Court correctly concluded that the jury necessarily found that Petitioner raped Respondent.

2. *The First Circuit Also Correctly Concluded That The Record Of The Abuse Action Taken As A Whole Demonstrates That The Jury Determined That Petitioner Raped Respondent*

The fact that the jury verdict in the Abuse Action necessarily determined that Petitioner raped Respondent is not only apparent from the manner in which the jury answered the statue of limitations question, it also is clear from the record taken as a whole. Where the judgment does not explicitly determine a particular issue that was undoubtedly raised and contested by the parties in an earlier action, a court in a second action is free to go beyond the judgment to examine the pleadings and entire record in determining whether collateral estoppel applies. *Precision Air Parts, Inc.* v. *Avco Corp.*, 736 F. 2d 1499, 1502 (11th Cir.) *reh'g den.*, 744 F.2d 97 (1984) *cert. den.* 469 U.S. 1191 (1985). The record in the Abuse Action, including the pleadings, the evidence, the trial court's jury instructions, and the arguments of counsel are further proof that the verdict must be read to include a finding that Petitioner raped Respondent.

From the outset, the Abuse Action was first and foremost about the claim that Petitioner had raped Respondent. The complaint in the Abuse Action makes this clear. The opening statements of counsel at trial of the Abuse Action—especially that of Petitioner's counsel—do as well. Respondent's testimony, in which she detailed the occasions when Petitioner raped her and her recovery of the memory of that abuse, also shows that the Abuse Action was first and foremost about Respondent's claim that Petitioner had repeatedly raped her when she was a child.

In its general instruction, the Abuse Action trial court told the jury that the case was about Respondent's claims that "from the time she was approximately four years old . . . the defendant subjected her to numerous acts of sexual abuse." The trial court went on to instruct the jury that "[a]s a result of the alleged acts of sexual abuse the plaintiff has asserted

the following claims under which she contends she is entitled to recover: (1) assault and battery; (2) infliction of emotional distress; and (3) breach of fiduciary duty." This general instruction makes clear that a finding for Respondent on any of the three counts depended upon a finding that she had been sexually abused. However, the trial court did not stop there, but focused the jury on the fact that the sexual abuse alleged consisted of repeated rapes.

For example, in its instruction on Assault and Battery, the trial court directed the jury to focus on Respondent's claim that Petitioner raped her as a predicate for finding a battery. The trial court specifically informed the jury that "rape is a form of battery", and explained in great detail that "rape" would include incidents of forced oral and digital penetration as well as genital penetration. The focus of the trial court's instruction on rape as the battery at issue demonstrates that in finding for Respondent, the jury found that Petitioner had raped her.

The trial court's general instruction demonstrates that any finding for Respondent on her other two counts against Petitioner also had to be premised on acts of sexual abuse. And when the trial court's jury instructions on the other two counts are read in the context of the testimony and arguments of counsel it is clear that the only "conduct" which could have been a predicate for a finding for Respondent were the repeated rapes Petitioner inflicted upon her.

In short, as the First Circuit and District Court ruled, a consideration of the pleadings, testimony, arguments of counsel and jury instructions in the Abuse Action make clear that the jury found for Respondent because they determined that Petitioner had raped her, and that (as the First Circuit stated) any argument to the contrary "is a wholly unrealistic

assessment of a trial in which the rapes were the central and pivotal issue."[10]

CONCLUSION

As the foregoing demonstrates, there are no compelling reasons to grant the Petition. Accordingly, the Petition should be denied.

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[10] News reports of the verdict in the Abuse Action demonstrate that journalists who covered and reported on the proceedings understood the verdict to be based on a determination that Petitioner had raped Respondent. *See, e.g.*, "**MAN MUST PAY $500,000 FOR RAPING DAUGHTER**," The Boston Globe, Friday, July 2, 1993, p. 1 and "**DAD TO PAY 500G IN DAUGHTER RAPES**", New York Daily News, July 3, 1993.